Supreme Court, U.S.
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NO. 91-1953

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MARKET/MEDIA RESEARCH, INC.,

Petitioner,

vs.

UNION TRIBUNE PUBLISHING COMPANY
and
THE COPLEY PRESS, INC.

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION

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PARTIES AND CORPORATE AFFILIATIONS

All parties to the proceedings below are named in the caption.

Petitioner Market/Media Research, Inc., is an Ohio corporation with its principal and only place of business in Cuyahoga County, Ohio. MMR is neither the parent nor a subsidiary of any other corporation.

Respondent The Copley Press, Inc., is an Illinois corporation and respondent Union-Tribune Publishing Co. is an unincorporated operating division of Copley. Both Respondents have their principal place of business in San Diego County, California.

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This brief is submitted pursuant to S.Ct.R. 15.7 to bring to the Court's particular attention conflicts between the decision of the Sixth Circuit in this case and the decision of the Third Circuit in *Carteret Savings Bank, FA v. Shushan*, 954 F.2d 141 (3rd Cir. 1992), which is also pending before this Court on petition for a writ of certiorari, *sub nom. Shushan v. Carteret Savings Bank, FA*, No. 91-1825.

In both cases, the plaintiff alleged that it was injured in the forum state by fraud and by other intentionally tortious conduct directed specifically at the plaintiff by out-of-state defendants.

In both cases, the defendants pursued patently frivolous challenges to the trial court's personal jurisdiction over them in disregard of the clearly controlling decision of this Court in *Calder v. Jones*, 465 U.S. 783 (1984), which held:

> ...An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California....In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis. *Id.* at 790.
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> We hold that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California. *Id.* at 791.

Yet in both cases the district courts granted the defendants' motions to dismiss for lack of personal jurisdiction. The Third Circuit reversed, correctly following the principles of law set forth by this Court in *Calder*, *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). The Sixth Circuit, however, affirmed the dismissal on grounds which this Court had previously considered and rejected. Specifically, the Sixth Circuit held that the assertion of personal jurisdiction over the defendants would be unconstitutional because:

> MMR made the initial contact. Defendants were never present in Ohio to conduct business with MMR, and Defendants never intended to execute a contract in Ohio. 951 F.2d at 105.

The Third Circuit "decline[d] to attach significance to the defendants' allegation that Shushan did not solicit Carteret" or to base its jurisdictional decision on which party requested the meeting at which the allegedly fraudulent conduct occurred. 954 F.2d at 150.

Although the crucial meeting between Shushan and Carteret took place in New Jersey, the Third Circuit, citing *Calder*, specifically held that when an intentional tort is alleged

> ... a court may exercise personal jurisdiction over a nonresident defendant who acts outside the forum state to cause an effect upon the plaintiff in the forum state.
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> ***
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> If allegedly tortious acts committed outside the forum state and causing effects within that state can suffice for the exercise of personal jurisdiction over a nonresident under the effects test, then clearly an allegedly tortious act committed within the forum state, which causes injury to a resident of that state, also conforms with due process. 954 F.2d at 148.

The Third Circuit noted that New Jersey courts had exercised personal jurisdiction over nonresident defendants whose only contacts with New Jersey were by telephone and mail. *Id.* at 147 (citing *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 558 A.2d 1252 (1989)). In *Lebel*, the New Jersey Supreme Court declared the issue well-settled and quoted the following statement by the First and Fourth Circuits:

> We would be closing our eyes to the realities of modern business practices were we to hold that a corporation subjects itself to the jurisdiction of another state by sending a personal mes-

> senger into that state bearing a fraudulent misrepresentation but not when it follows the more ordinary course of employing the United States Postal Service as its messenger.***Where a defendant knowingly sends into a state a false statement, intending that it should then be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state. *Vishay Intertechnology, Inc. v. Delta Int'l. Corp.*, 696 F.2d 1062, 1066 (4th Cir. 1982) (quoting *Murphy v. Erwin- Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972)).

Yet the Sixth Circuit panel disregarded this Court's decisions, Ohio jurisprudence and Sixth Circuit precedents (which it could not lawfully refuse to follow) and concluded that telephone and mail contacts are insufficient to support the exercise of long-arm jurisdiction. ("MMR points to twenty-two contacts between MMR and Defendants, nine of which Union or Copley executives initiated. All contacts between the Defendants and MMR. however, were by telephone or mail, and the parties agree that Union and Copley do not generally engage in activities in Ohio." 951 F.2d at 103.)

In both cases, intentionally tortious conduct occurred in connection with interstate commercial obligations which the defendants had voluntarily assumed and from which they expected to derive substantial financial benefit. *Burger King*, 471 U.S. at 473-474. (The Shushan firm entered into an agreement to represent Carteret in an $82-million loan transaction for which it expected to receive a substantial fee. The defendants in this case entered into an agreement with Market/Media Research, Inc. (MMR) to participate in a J.C. Penney demonstration project from which they expected to receive substantial increases in advertising revenues.)

It is well settled that a motion to dismiss for lack of personal jurisdiction does not "challenge the intendment of the complaint," *Hugel v. McNell*, 886 F.2d 1, 5 fn 4 (1st Cir. 1989), and that all questions of substantive law and all questions of fact must be decided after, and not before, the court assumes jurisdiction. *Keeton*, 465 U.S. at 778 and fn 9; *Burks v. Lasker*, 441 U.S. 471, 476 fn 5 (1979); *Bell v. Hood*, 327 U.S. 678, 682 (1946).

Notwithstanding, the district court in *Shushan* declared that the plaintiff's allegations of fraud were "factually incorrect." In this case, the district court disregarded the plaintiff's complaint and affidavits altogether and adopted as its statement of the "relevant jurisdictional facts" an unsupported, fictional account of the parties' dealings taken almost verbatim from the defendants' brief.[1] Pet., App. 86-89.

The district court's memorandum opinion (Pet., App. 10- 15), does not even mention MMR's fraud claim.

The district court ruled that it lacked jurisdiction over the *Shushan* defendants, saying "there is no evidence or suggestion that the allegedly fraudulent provision of the contract was

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[1] The statement of the court of appeals that, "Contrary to MMR's assertions, there is no indication that, in drawing its conclusion, the district court 'adopted' Copley and Union's version of the facts," 951 F.2d at 105, does not accord with the facts of record. MMR's Reply Brief in the court of appeals provided, on fold-out pages, a line-by-line comparison of the district court's statement of the "relevant jurisdictional facts" with the corresponding statements in the defendants' brief and with the averments in the affidavits of MMR's president Robert Rhodes which they contradict. Corresponding statements were numbered in red to assist the court. Those same pages were appended to MMR's petition for rehearing and rehearing *en banc*. Since this Court's rules prohibit the use of that format, only an excerpt from that table identifying the sources of the district's court's "facts" in the brief of the defendants is included in the Appendix to the Petition for Certiorari, pp. 86-89.

specifically discussed" at the pre-closing meeting. The Third Circuit reversed, pointing out that the failure of the defendants to disclose the unfavorable contract provision or their conflict of interest at that meeting was "precisely the crux" of Carteret's fraud claim. 954 F.2d at 146.

The Sixth Circuit perfunctorily acknowledged that MMR had *stated* claims for "fraud, conversion and related torts," 951 F.2d at 103, but failed to consider them in its analysis of the jurisdictional issue, although they were clearly raised in the Statement of Issues Presented for Review. Pet., App. 83-85. Instead, the panel opinion declared that "Defendants never intended to execute a contract in Ohio." 951 F.2d at 105. That, of course, is "precisely the crux" of MMR's fraud and conversion claims: The defendants made a contract with MMR which they had no intention of performing. The defendants subsequently requested and received the services covered by that contract *after* the documentary evidence clearly shows they had decided among themselves not to pay for those services.

The pertinent allegations of the Amended Complaint (Pet., App. 19-20) are:

> 2. Plaintiff is an Ohio corporation engaged in the business of providing research, marketing and management consulting services to clients.
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> ***
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> 5. On or about April 15, 1988, Defendant Union-Tribune promised to pay Plaintiff for a research study of San Diego County provided Plaintiff submitted a proposal for the study acceptable to the J.C. Penney Co. and profitable to the newspapers.
> 6. On May 24, 1988, Plaintiff submitted to Defendant Union-Tribune a proposal that met those requirements.

7. By their conduct, Defendants accepted the terms of Plaintiff's Services Agreement (Exhibit "A") which was sent to the Union-Tribune along with the research proposal on May 24, 1988. By its terms the Agreement was executed in Cleveland, Ohio.

***

12. Union-Tribune falsely and knowingly represented to Plaintiff that it would pay for Plaintiff's services, intending that Plaintiff should rely on its promise.
13. Plaintiff did rely and had a right to rely on Union-Tribune's promise and spent several months developing the research study and obtaining from the J.C. Penney Co. a commitment to increase its advertising in Defendants' newspapers, foregoing other work to perform these services for Union-Tribune.
14. Plaintiff was damaged and suffered financial loss as a result of Union-Tribune's fraudulent conduct.

Paragraphs 5-7 allege a unilateral contract offer *by the defendants* on April 15, 1988, which was accepted by Plaintiff's performance on May 24, 1988, and which was subsequently replaced by the written Services Agreement. (The Services Agreement contains an integration clause and is therefore a novation of the earlier contract.) The contract language expressly provides that the agreement was "made at Cleveland, Ohio" between the defendants and MMR, which is identified as an Ohio corporation.

Paragraphs 12-14 allege that the defendants' promises to pay for plaintiff's services were knowingly false and that MMR suffered injury as a result of the defendants fraudulent conduct.

The defendants in this case, like the *Shushan* defendants, did not deny their contacts with Ohio, but rather disputed the substantive allegations of the complaint. As the Third Circuit held, the merits of the plaintiff's claims are not before the court on a motion challenging personal jurisdiction. 954 F.2d at 146 and 148. A challenge to specific personal jurisdiction which does not dispute "the relationship among the defendant, the forum and the litigation," *Calder*, 465 U.S. at 788, but rather disputes the merits of the plaintiff's claims is a frivolous and dilatory motion that should be sanctioned under Rule 11, especially when the defendants falsify the facts and misstate or ignore the applicable law in their efforts to defeat jurisdiction.[2]

In *Burger King*, 471 U.S. at 476-477, this Court delineated the respective burdens of the parties when the court's personal jurisdiction over a defendant is challenged: The plaintiff initially bears the burden of making a prima facie case that jurisdiction *exists* under the laws of the forum state. When the plaintiff has done that, the burden shifts to the defendant to "present a compelling case that the presence of some other considerations" would render the *exercise* of jurisdiction unreasonable. *Id.* To determine whether the defendant has met *its* burden, the Court repeated the criteria set forth in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

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2 The defendants' misrepresentations of fact and law continued in the court of appeals. MMR documented, in a separate memorandum filed in that court, more than 60 misrepresentations of case law in the defendants' appellate brief. The defendants' single mention of *Calder* is typical. "Media relies on several libel and fraud cases to support its claims to jurisdiction. (Appellant's brief at 27-29). Each case is distinguishable....In *Calder v. Jones*, 465 U.S. 783 (1984)...the defamatory matter was published in the forum state." Appellees' Brief at 47-48. In *Calder*, this Court explicitly noted that the act of publishing the defamatory story was the act of the corporate co-defendant which *could not* serve as the basis for jurisdiction over Calder, the employee who edited and approved the story. 465 U.S. at 789.

The Third Circuit properly applied those standards, 954 F.2d at 150. The Sixth Circuit ignored them, although, again, the issue was clearly raised in the Statement of Issues Presented for Review. Pet., App. 83-85.

Since state statutes are presumptively constitutional, a factual showing by a defendant that the *exercise* of jurisdiction would be unreasonable and therefore violative of due process is the *sine qua non* of a personal jurisdiction challenge. When a defendant cannot "make a compelling case" that trial in a forum properly chosen by the plaintiff would be so fundamentally unfair to that defendant as to deprive him of substantive due process, he has no reasonable basis for challenging jurisdiction in that forum.

The Sixth Circuit decision, however, stands long-arm jurisprudence on its ear.

In an Ohio diversity case, the panel dismissed the Ohio long-arm statute with a footnote, 951 F.2d at 104 fn 1, and an off-hand declaration that consideration of Ohio law is unnecessary because it would be unconstitutional anyway. *Id.* at 104. Then the panel misapplied a *Michigan* decision interpreting that state's long-arm statute to the present case, contrary to the decisions of Ohio's supreme court and court of appeals and in clear violation of the *Erie* doctrine. *Id.* at 106.

Finally, although this Court's decision in *Burger King* placed on the defendant the burden of showing how the *exercise* of personal jurisdiction under a presumptively constitutional state long-arm statute would violate due process, the Sixth Circuit improperly shifted to the plaintiff the burden of showing that the *exercise* of jurisdiction which clearly *exists* under the Ohio long- arm statute *would be* constitutional against the implicit presumption that it would *not*!

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

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